

THE HIGH COURT OF JUSTICE, EDO STATE OF NIGERIA
IN THE BENIN JUDICIAL DIVISION HOLDEN AT BENIN CITY
BEFORE HIS LORDSHIP: THE HON. JUSTICE E. A. EDIGIN -
JUDGE ON TUESDAY THE 2ND DAY OF AUGUST 2016

BETWEEN:

SUIT NO. B/83/2001

LIZZY AMAGHIZEMWEN	}	PLAINTIFF/APPLICANT
(Suing by Her lawful Attorney			
ISIBOR LUCK AIGBE			

AND

SEGUN AGHAHOWA	DEFENDANT/RESPONDENT
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J U D G M E N T

By her further Amended Statement of claim, the claimant claims against the defendant as follows:-

- a). A declaration that the plaintiff is entitled to possession of the mortgaged property lying and situate at No. 5A, 2nd Ire Street, Off Wire Road, Benin City, the Defendant's late father Mr. Williams Enogeeru Aghahowa having Mortgaged same to the Plaintiff and the Plaintiff having foreclosed the mortgaged property and so the property in the said house lying and situate at No 5A, 2nd Ire Street, Off Wire Road, Benin City is now vested in the Plaintiff absolutely under the terms of the said Deed of Mortgage.
- b). A declaration that the property in the house and premises lying, situate and known as No 5A, 2nd Ire Street, Off Wire Road, Benin City did not form part of the Real Estate of the Defendant's late father on the date of his death, the said Defendant's late father having divested himself of the property in the said house under and by virtue of the aforesaid Deed of Mortgage and other documents and as such cannot devolve on any of his children.

- c). An order directing the Defendant to vacate plaintiff's said house lying and situate at No. 5A, 2nd Ire Street, Of Wire Road, Benin City and give possession to the Plaintiff.

IN THE ALTERNATIVE

Payment to the Plaintiff the sum of N25,000,000 (Twenty five million naira) being the value of the Mortgage property foreclosed and forfeited to the Plaintiff.

In proof of her claim, the Claimant testified through her lawful attorney and tendered seven exhibits namely: Exhibit C, C1, C2, C3, C4, C5, and C6.

In response, the Defendant filed his statement of Defence and testified for himself. He tendered Five (5) exhibits to wit | : Exhibit D1, D1, D2, D3 and D4.

No reply was filed to Defendant's statement of Defence by the Claimant.

At the close of parties' case, the Defendant counsel filed his written address via a motion granted 4/11/2015. On the other hand, the Claimant counsel also filed his final written address via a motion granted 19/4/16. The Defendant counsel filed a reply on points of law, to claimant's final written address.

The evidence of the Claimant and the Defendant are reproduced below:-

Claimant's case opens:-

CLAIMANT

My names are Isibor, Lucky Aigbe. I live at No. 4 Bazuaye Street, Off Upper Sakponba Road, Benin City. I am a businessman.

That the Claimant is a Bini by tribe and an international businesswoman ordinarily resident abroad and has consequently donated a Power of Attorney to me to prosecute this case for her.

The Defendant is also a Bini by Tribe and resides at No. 5, 2nd Ire Street, Off Wire Road, Benin City.

That on or about the 10th day of January, 1991, the Defendant's father late Mr. Williams Enogieru Aghahowa, approached the Claimant for a friendly loan of N30,000:00 (Thirty Thousand Naira) free from interest to enable him the said William Enogieru Aghahowa execute a contract which he claimed to have entered into with the Benin Owena River Basin Development Authority.

That upon a firm promise by the Defendant's father to pay back the friendly loan of N30, 000:00 (Thirty thousand Naira) without interest on the 15th day of February 1991, having convinced the Claimant that payment would be made to him for the contract by the said Benin Owena River Basin Development Authority immediately after execution, that the Claimant agreed and loaned the said sum of money to the Defendant's father without interest.

That an agreement in respect of the said loan was entered into and executed by the Defendant's late father and the Claimant on the 15th day of January, 1991. A copy of the Agreement is attached to the Statement of Claim.

That in consideration of the said loan given to the Defendant's late father without interest, the said Defendant's father Mr. Williams Enogieru Aghahowa deposited with the Claimant title documents of his house and property lying and situate at No. 5A, 2nd Ire Street, Off Wire Road, Benin City to wit: (a) Oba's Approval dated the 13th day of June, 1963 and approved by the Oba on the 22nd of June 1963, a Deed of Conveyance made between the Oba of Benin His Highness Oba Akenzua 11 and the said Defendant's late father dated the 10th day of June, 1969 and a Survey Plan No. 938 date 22nd day of November, 1963 as security for the said interest free loan. Copies of these documents are attached to the Statement of Claim.

That on or about the 25th day of January, 1991, the Defendant's father, came to the Claimant to request for an additional N15,000:00 (Fifteen Thousand Naira) loan free from interest to enable him conclude his contract successfully as the previous loaned of N30,000:00 was not sufficient for the stated purpose.

That it was with great reluctance and after much persuasion by the Defendant's late father that the Claimant gave the second loan of N15,000:00 (Fifteen Thousand Naira) to the said Defendant's late father thus bringing the total amount loan to the Defendant's father to the sum of N45,000:00 (Forty-Five Thousand Naira).

That the Defendant's father again affirmed his promise to pay back the total loan of N45,000:00 (Forty-Five Thousand Naira) on or before the 15th day of February, 1991 after reassuring the Claimant that were he not ready to pay back the loan he would not have deposited the title documents of his house with the Claimant.

That on the 14th day of February, 1991 a day to the date i.e, 15th February, 1991 when the Defendant father was expected to pay back the loan, the Defendant's father came to the Claimant pleading that he was unable to get the sum of N45,000:00 (Forty-Five Thousand Naira) to offset the loan, that the said company for which he executed the contract refused to pay him the contract money and that the Claimant should please graciously extend the time or payment to the 16th day of March, 1991.

That the Defendant's father in a bid to allay the fear expressed by the Claimant over the repayment of the loan, the Defendant's late father promised to mortgage his house at No. 5A, 2nd Ire Street, Off Wire Road, to the Claimant pending when he pays the said loan on the 16th day of March, 1991 and/or that in the alternative the Claimant can sell the property to recover the loan if he fails to pay back on or before the 16th day of March 1991.

That consequent upon the promise given above in paragraph 11 by the said Defendant's late father, a Deed of Mortgage in respect of the house was executed by the Defendant's father and the Claimant on the 14th day of February, 1991. A copy of the Deed of Mortgage is attached to the Statement of Claim.

That when the Defendant late father failed to repay the loan in the month of March, 1991 as promised, he again pleaded with the Claimant for an extension of time of payment to the 20th day of June, 1991 for the very last time, stating that his children overseas have promised to help him repay the loan on or before the date.

That the Defendant's late father deposed to an affidavit on the 4th day of April, 1991 wherein he deposed to the fact that should he fail to pay the loan on the 20th day June, 1991. He automatically forfeits his house at No. 5A, 2nd Ire

Street, Off Wire Road, Benin City subject of the Mortgage between the said Defendant's late father and the Claimant. A copy of the Affidavit is attached to the statement of claim.

That after the demise of the Defendant's father, the Defendant took possession of the said house and property at the aforementioned address, claiming possessory right over the house and property on ground that he is the eldest son of his late father **Mr. Williams Enogieru Aghahowa**.

That upon discovering the above stated fact, the Claimant instructed the Law Firm of Mr. O. Akpodono & CO., former Solicitor to the Claimant to write a letter to the Defendant intimating him with the true position in respect of the said house and property.

That several correspondence were exchanged between the Claimant's solicitors and the Defendant's Solicitors in respect of the loan transaction between the Claimant and the Defendant's late father and that the Defendant through his Solicitors J. O. Aghimien & Co., made some payment to the total sum of N15,000,00 (Fifteen Thousand Naira) leaving a balance of N30,000:00 (Thirty Thousand Naira) with a promise to offset the balance. The Defendant is hereby

put on notice to produce originals of the letters written to him by the Claimant solicitors at the trial of this suit.

That the Defendant reneged on his promise and instead started laying unfounded claim to the ownership of the house and property claiming that his father never mortgaged the house to the Claimant as there was never a loan transaction between the Claimant and his late father that the said transaction is only a figment of the Claimant's imagination.

That the said house and premises do not form part of the real estate of the Defendant's late father on the date of his death having lost the house to the Claimant under and by virtue of the Mortgage and other documents relating to the loan transaction and further states that the house did not and do not devolved on the Defendant under the Bini Customary Law of Inheritance

CROSS –EXAMINATION

I am not the first attorney for the claimant. I am the third attorney in this case. I witnessed some of the transactions leading to this matter. They are the incidents of 10./1/1991 and 15/11/1991. I am not aware that the Claimant previously sued the Defendant's late father in respect of the loan in this case. I am not aware that the Defendant's late father made payments to the Claimant

through Mr. Akpodono to the Claimant. I am aware that at all times that the Defendant's late father was alive, the Claimant's lawyer was Mr. Akpodono. I know that Mr. Akpodono was the first lawyer who filed this suit and filed a motion for interlocutory injunction against the Defendant. I know that the Defendant in this suit filed a counter affidavit to the motion for interlocutory injunction. I did not see the counter affidavit. I did not see the writ of summons and the motion for interlocutory injunction filed by Akpodono in this case. I am not aware that Exhibit C5 was extracted by force. There was no time I was arrested in connection with exhibit C5. I am not aware that Claimant was arrested by Police in connection with Exhibit C5. I am not also aware that Mr. Akpodono made statement to the police in respect of Exhibit C5. I am not aware that suit No. B/316/1991 was filed by Claimant against the defendant's late father to frustrate police investigation in respect of Exhibit C5.

Defence Opens:-

DEFENDANT

My names are Olushegun Aborishade Aghahawo. I am based in Lagos but my Benin address is No. 5A, 2nd Ire Street, Off Wire Road, Benin City. I am a Legal Practitioner.

That I know Mr. Williams Enogieru Aghahowa as My biological father, he died in 1991. I am the Defendant in this suit. I know one Mrs. Lizzy Amaghizemwen I had opportunity to meet with her while my father was alive.

I do not know any person known and call Mr. Isibor Lucky Aigbe (the lawful Attorney of the Claimant) Mr. Isibor Lucky Aigbe knows nothing about the transaction between my late father and Mrs. Lizzy Amaghizemwen.

My late father Mr. William Enogieru Aghahowa to my knowledge received as loan from one Mrs. Lizzy Amaghizemwen the sum of Fifteen/thousand Naira (N15,000) only and that because my father was in desperate need of financial assistance to meet a sudden unforeseen circumstance, the Claimant exploited him of the moment and made him sign a document for Thirty Thousand Naira (N30,000)

That the additional Fifteen Thousand Naira (N15,000) Ostensibly intended to be the 100% interest on the N15,000 (Fifteen Thousand Naira) loan. At all material times thereafter my late father to my knowledge made it clear to the lender/Claimant that what he borrowed was N15,000 (Fifteen Thousand Naira) I have a letter written by my late father's solicitors with Ref. No. ALC/VOL1/17/1991 with me in Court and I seek to tender same in evidence, I have

a photo-copy the original is with Claimant who was given notice to produce same in paragraph 6 of my statement of Defence.

Without prejudice to the issue raised in the above solicitor's letter of 21st June 1991 my late father paid the Claimant the sum of N5,000 (Five thousand naira) by New Nigeria Bank Draft No. 669003 leaving a balance of N10,000 (Ten thousand naira) of the actual amount borrowed. That surprisingly my father received from the Claimant the service of a writ of summons with suit No. B/136/91 on him hence he stopped further payment until the issues raised by the Claimant in the said suit are resolved. However the said Suit No. B/136/91 was later struck out for lack of diligent prosecution. My late father never asked for nor received additional loan of N15,000 (Fifteen Thousand Naira) on or about 25 January 1991.

My late father did not receive any other loan or money from the Claimant) within such short period when the original amount lent had not been paid. The story is a figment of the Claimant Imagination seek to tender the Claimant Solicitor's letter in Exhibit.

From January to March 1991, the Claimant through her Solicitor and fierce looking armed thugs force my father to surrender his title documents of his house

at No. 5A, 2nd Ire Street, Benin City and to sign all sundry document at the pain of death or under duress including an alleged deed of mortgage and a prepared Affidavit in the office of her Solicitor upon an invitation of my father to the office of the Claimant Solicitor.

At all time material to the time my late father signed the documents relating to the loan, he was not in his free frame of mind. He did not do so voluntarily. In fact at a stage my father was constrained to seek police protection from the hands of the Claimant and his thugs/agents and Solicitor M. O. Akpodonor.

My late father did not at any time intend mortgage/part with his house at No. 5A, 2nd Ire Street, Off Wire Road, Benin City or any other property for the loan of N15,000 (Fifteen Thousand Naira) which he received from the Claimant. The document purportedly signed by my late father in respect of this matter are null, void and are of no effect whatsoever as he was forced to sign them.

My father did not go to High Court to depose to any Affidavit before the Commissioner for Oath it was the Claimant and her Solicitor who surreptitiously took the prepared Affidavit my late father was forced to sign in the Claimant's took the prepared Affidavit my late father was forced to sign in the Claimant's

Solicitor's office to the High Court to be Sworn to before the Commissioner for Oath. At the death of my father after performing the burial ceremony of my father in accordance with Bini Native Law and Custom I stepped into the shoes of my father and exercise possessory right over all my father's estate as once a mortgage is always a mortgage.

My late father made payment of N5,000 (Five Thousand Naira) in Bank Draft of the African International Bank , Urubi Branch, Benin City Bank Draft no. F040730 on 22nd of September 1993 which brought the total payment made by my late father to N15,000 (Fifteen Thousand Naira) which was actually the sum borrowed and received as loan from the Claimant on this premise suit No. B/136/91 was struck out.

While he was making effort to pay the interest my late father was surprised to receive a letter from the Claimant's solicitor request him to pay N2,500,000 (Two Million Five hundred Thousand Naira Only being the purported value of the said property thereby putting a clog at redeeming the mortgaged property as alleged by the Claimant. That all the deposed facts and circumstances were related to me by my late father and I also witnessed them to the best of my knowledge and information before he died in 1991.

The Defendant urge this Honourable Court to dismiss the Claim/Reliefs of Claimant contained in paragraph 20(a -6) of the further Amended Statement of Claim or any reliefs thereof.

CROSS-EXAMINATION

Claimant was one of my father's concubines even though she did not have a child for him like others did. When she was coming to our house to stay a day or two with my father, she never came with her family. So I do not know any members of her family. I was not privy to the loan transaction between the Claimant and my father but there were witnesses and guarantors who are supposed to be joined in this suit. Yes I was in Lagos when this transaction took place. My father signed the Deed of Mortgage under duress because they were lovers.

My father signed Exhibit C5 under duress also. My late father was learned. He was a member of the House of Representatives in the first Republic. My father was also a registered contractor to the Benin Owina River Basin Authority. It is not to my knowledge if there is any affidavit by my father retracting Exhibit C5. My father died in the year 2000. I am aware the friendly loan was taken in 1991 without interest. My father lived nine more years after the loan was taken

and before his demise. Yes I live at NO. 5A/10 Ire Street, No. 5A and No. 10 Ire Street are two different houses. They are opposite each other. There is a road dividing the two houses. No. 5A is a storey building occupied by tenants. My father was buried there. His grave is there. Yes I have lived all my life in Lagos except when I was in college. Yes most of the things that happened in Benin, I was told. My father told me it is not correct that I was warned by Claimant's solicitor not to bury my father in No. 5A Ire Street. But while I was burying my father, I was served with a writ of summons that was not endorsed by the Court. It was a kind of an advance copy. I was aware of Exhibit C4 which my father was coerced to sign before I buried him, but there was no restriction on us not to bury him at No. 5A because the family approved his burial at No. 5A. It was after the burial while searching through my father's wardrobe that I became aware of the documents. In paragraph 6 of my deposition on oath, I referred to a letter written by my late father's lawyer. Exhibit D is not the letter. The letter is the one written by Aghimen Esq. now SAN. This is the letter I am referring to in 6 of my deposition. This is the original letter (Exhibit D4).

It is not stated in Exhibit D4 that my father owed a total debt of N15,000:00. The amount claimed in Exhibit D1 is N45,000:00. I am aware that my father reported the matter to the police at New Benin because that was the

advise I gave him. I have no documents to that effect. The documents are with the police who incidented the case.

I would not know if my father made any other payment after 1993. I have not as stated in paragraph 12 given judgment in this case. I do not know why suit B/136/91 was struck out. I was not privy to it. I am literate. I signed my witness deposition personally. I am not in court to mislead the Court.

Re-Examination

Though I lived all my life in Lagos, I was coming home to visit my father that is how I know the Claimant. Final Address of parties were filed by learned counsel and adopted as their final argument for their respective cases. The final addresses are reproduced below:

COURT:

I have read the pleadings, oral and documentary evidence of the parties, final written address of learned counsel.

Briefly the facts of the case as alleged by the Claimant are that in January 1991 the Defendants late father approached the Claimant for a friendly loan of N30,000:00 free from interest to enable him execute a contract with Benin – Owena River Basin Authority. Having convinced the Claimant that he would pay the loan back on the 15th of February 1991 immediately after he was paid for the contract, the Claimant agreed and loaned the defendant's late father the N30,000:00 without interest. An agreement was entered into between them for the loan. In consideration of the loan, the Defendant's late father deposited with the Claimant the title documents of his house at No. 5A, 2nd Ire Street, Off Wire Road, Benin City. Later the Defendant's late father requested for an additional loan of N15,000 also free from interest to enable him conclude the contract successfully as the loan of N30,000:00 was insufficient to execute the contract. The Claimant agreed and the total money loaned the Defendant's late father by the Claimant came to N45,000:00 free from interest. The loan was to be paid back on the 15th day of March 1991. A day before the 15th of March 1991 when

Defendant late father was expected to pay back the loan he went to Claimant to plead for an extension of the pay back date as the company he executed the contract for had not paid him. To allay the Claimant's fears that he was not ready to pay, Defendant's late father then executed a Deed of Mortgage on 14th February, 1991 with claimant in respect of his house of which he had earlier deposited the documents with the Claimant. When defendant's late father failed to pay back the loan as promised in March 1991, he again asked for extension of time to June 1991 for the last time and then he deposed to an affidavit on 4th of April 1991 stating that if he failed to pay the loan in June, he automatically forfeits the house.

Defendant's late father died in year 2000 without paying back the loan in full. Defendant then claimed the house, the subject matter of the mortgage as the eldest surviving son of his late father. Claimant's lawyer then wrote the defendant to intimate him of the true position in respect of the house No. 5A, 2nd Ire Street, Off Wire Road, Benin City. Defendant's father was buried in the property. After series of correspondences between Claimant and Defendant's counsel over the mortgage, Defendant through his counsel paid N15,000:00 leaving a balance of N30,000. It is the Defendant's refusal to pay the N30,000 since then that has led to this suit.

The Defendant's case is that what his father borrowed was actually N15,000 but because he was desperate for money to meet unforeseen circumstance, the claimant made him to sign an agreement for N30,000 and that the additional N15,000 that made up the N30,000 was actually 100% interest on the N15,000 borrowed as loan. Defendant's late father paid N5,000 leaving a balance of N10,000 and that his late father never borrowed an additional N15,000.

Defendant alleges That Claimant was his father's mistress and that his father was forced to surrender the title documents of his house and sign sundry documents at the pain of death and under duress which documents include the Deed of Mortgage and the affidavit and that he was forced to seek police protection. It is alleged that Defendants late father never intended to mortgage his house for N15,000. Defendant contends that the Claimant had sued his late father in suit B/136/91 for the balance after the payment of N5,000 = but after an additional payment of N10,000 was made making the payment of the actual loan to be N15,000 the suit was struck out. Defendant further contends that while he was making arrangement to pay the balance of the money as requested for by Claimant, he received a letter from Claimants solicitor that the balance he is to pay is N2,500,000 being the purported value of the property, he had to stop

payment because by so doing the Claimant had closed the redemption of the mortgage.

While learned counsel did not formulate any issues for determination, learned counsel for Claimant formulated two issues for determination to wit:-

1. Whether from the oral and documentary evidence in this case, the defendant is still entitled to Equity of redemption.
2. If the answer to issue (a) is in the affirmative what is the quantum of reparation the claimant is entitled to consequent upon the breach of the equitable mortgage between the defendant and the Claimant by the defendant.

From the state of the oral and documentary evidence before this Court, the parties are agreed on the following.

1. That the Claimant was one of Defendants late father's mistresses.
2. That the Defendants late father borrowed money from the Claimant, which loan was regarded as friendly loan without interest.
3. That the defendant late father deposited his title documents in respect of his house at No. 5A, 2nd Ire Street, Off Wire Road, Benin City as security for the loan while he remained in possession of the house.
4. That the Defendants late father in his life time paid N15,000 is part of the money borrowed leaving a balance of N30,000:00.

This is a case that deals with mortgage of property. A mortgage is a conveyance of title to property that is given as security for the payment of a debt

or the performance according to the stipulated terms. It is also described as a transfer of an interest in specific immovable property for the purpose of securing the payment of money advanced or to be advanced by way of loan, an existing or future debt, or the performance of an engagement which may give rise to a pecuniary liability. See the case of **Gwarzo v Mohammed (2013) 12 NWLR Pt 1369 pg 576 at 604.**

A mortgage may either be legal or equitable. A legal mortgage arises when the owner of a property surrenders his legal title of the property to a lender or creditor to secure payment of the owner's debt. The legal title reverts to the original owner the moment the loan is repaid or debt is liquidated. A legal title is the most secure and comprehensive form of security. It transfers legal title to the mortgagee and prevents the mortgagor from dealing with the mortgaged property where it is the subject to the mortgage. Legal mortgage is created by Deed of mortgage or mortgage Deed.

An equitable mortgage is one in which the lender is secured by taking possession of the original title documents of the property that serves as security for the mortgage. It is effected by mere delivery of the documents of title to the property to the mortgagee. The mortgagor throughout the memorandum of

deposit undertakes to grant a legal mortgage if he fails to pay the mortgage money. See **Gwarzo v Mohamed (Supra at page 606)**.

An equitable mortgage is a transaction that has the intent but not the form of a mortgage and a court of equity will treat it as a mortgage.

The characteristics of a mortgage are as follows:-

- a. A mortgage can be effected only on immovable property. Immovable property includes land, benefits that arise out of land and things attached to earth like trees, buildings and machinery. But a machine which is not permanently fixed to the earth and is shiftable from one place to another is not considered to be immovable property.
- b. A mortgage is the transfer of an interest in the specific immovable property. This means the owner transfers some of his rights only to the mortgagee. For example, the right to redeem the property mortgaged.
- c. The object of transfer of interest in the property must be to secure a loan or performance of a contract which results in monetary obligation. Transfer of property for purposes other than these will not amount to mortgage. For example, a property transferred to liquidate prior debt will not constitute a mortgage.
- d. The property to be mortgage must be a specific one. That is, it can be identified by its size, location, boundaries etc.
- e. The actual possession of the mortgage property is generally with the mortgagor.
- f. The interest in the mortgaged property is reconveyed to the mortgagor on repayment of the loan with interest due on.

- g. In case the mortgagor fails to repay the loan, the mortgagee gets the right to recover the debt out of the sale proceeds of the mortgaged property (*Pp. 604-605, Para. E – C*)

Going by the characteristics of a mortgage Exhibit C4 does not disclose that the loan of N45,000 is with interest and the evidence from the parties is that it is a friendly loan without interest though it is called a Deed of Mortgage. One may be tempted to say that since Exhibit C4 does not disclose interest payable on the loan and evidence says that it is a friendly loan without interest, it does not fit the characteristics of a mortgage. However the same case of **Gwarzo vs Mohammed (Supra at page 605 -606)** decided that the Courts of equity are not governed by the same principles as Courts of law in determining whether a mortgage has been created, and generally whenever a transaction resolves itself into a security, or an offer or attempt to pledge land as security for a debtor's liability, equity will treat it as a mortgage without regard to the form it may assume, or the name the parties may choose to give it.

On the requirements of an equitable mortgage there must be a debt existing, there must be deposit of title deeds and the title deeds should be deposited as security for the debt. See **Gwarzo v Mohammed at pg 605**

Equitable mortgage gives the mortgagee the right to foreclose on the property, sell it or appoint a receiver in case of nonpayment.

Exhibit C4 is the Deed of Mortgage between the defendant's late father and Claimants. So even though no interest is disclosed as payable in Exhibit C4, the requirements of an equitable mortgage are present therein. In Exhibit C4 there is a debt in existence, there is a deposit of title documents and they were deposited as security for the debt.

So by whatever name Exhibit C4 is called I will regard same as a friendly loan without interest with the requirements of an equitable mortgage. Coming to the substance of the case.

In this instant case, the Claimants states that the amount loaned the defendants father is N45,000. While the defendant states that it is N15,000 with N15,000 interest which makes a total of N30,000 . I believe that the amount loaned to the defendants late father is N45,000. This is what Exhibit C4 states. The defendant did not contradict Exhibit C4 with any other document and it is the law that oral evidence cannot be used to contradict document as evidence. See Section 128(1) of the Evidence Act which States:

Section 128(1)- "When a judgment of a court or any other judicial or official proceeding, contract or any grant or other disposition or property has been reduced to the form of a document or series of documents, no evidence may be given of such judgment of proceeding or the terms of such contract, grant or disposition of property except

the document itself, or secondary evidence of its contents in cases in which secondary, evidence is admissible under this Act; nor may the contents of any such document be contradicted, altered, added to or varied by oral evidence.”

See also the case of Federal Capital Development Authority & anor Vs.

Kuda Engineering and Construction Company Limited & Ors (2014) 34 W.R.N.

Page 72 particularly at Page 116 where the Court of Appeal per TUR JCA held as

follows:-

“The parties adduce oral and documentary evidence in the Court of trial. I have examined the proceedings in the trial Court. They are based on oral and documentary. Documentary exhibits are usually based to evaluate oral evidence. See Onwuteaka V. Davco Technical Services Supplies Ltd. (1990) 2 FCA 62 at 77, Fashanu v. Adekoya (1974) 1 All NLR (Pt. 1) 35 at 41; (1974) 6 S.C. 83, Olujinle v. Adeagbo (1988) 2 NWLR (Pt 25) 238 at 253, Oscar Reynard v. Williams Allan (1934) 2 WACA 52 at 53 and kimdey v. Military Governor of Gongola State (1988) 2 NWLR (pt 77) 445 at 473; (1988) 5 SCNJ 28; (1988) 1 NSCC 827; (1988) 5 S.C. 46. Oral evidence may not be employed by any of the parties to contradict, alter, add to or to vary the contents of Exhibits ‘B’ , ‘C’ and ‘P’ which constitutes the foundation of the legal relationship between the parties. See Union Bank of Nigeria Ltd v. Ozigi (1994) 3 NWLR (Pt. 333) 385; (1994) SCNJ 41, Union Bank of Nigeria Ltd. v Sax Nigeria Ltd. (1994) 9 SCNJ 13; (1994) 8 NWLR (Pt. 36) 150.”

Therefore, oral evidence of the contents of an equitable mortgage is statutorily forbidden to be given to alter or contradict the said equitable

mortgage. I am fortified in this finding by the case **of First Bank of Nigeria Plc Vs. Mvendaga Jibo (2006) 9 N.W.L.R. Part 985 Page 255** especially at Page 272 where the Court of Appeal per **NZEAKO J.C.A.** put the state of the law beyond peradventure as follows:

“As a matter of law, by virtue of Section 13(1) of the Evidence Act, no evidence of the equitable mortgage may be given in Court except the production of the document itself, nor can its contents be contradicted by oral evidence, and, an Appeal Court is in as good a position as a trial Court to evaluate its effect on the matter before the Court, after hearing Counsel for both parties.”

See also Babatunde V. B. O. N Ltd (2011) 18 NWLR (Pt 1279,) 738

It is disclosed in evidence that what the defendant late father paid is N15,000 out of the N45,000. Leaving a balance of N30,000. This is clearly evidenced by Exhibit D4. The letter written by Defendants late father's counsel, J. O. Aghimen Esq. to the Claimants counsel; Exhibit D4 did not state that the payment of N15,000 was the full and final payment in satisfaction of the loan. It only states that the further payment of N5,000 brought the total payment to N15,000. Exhibit D4 is corroborated by the evidence of the Claimant on oath in paragraph 17 thereof which states:

“That several correspondence were exchanged between the Claimant’s solicitors and the Defendant’s Solicitors in respect of the loan transaction between the Claimant and the Defendant’s late father and that the Defendant through his Solicitors J. O. Aghimien & Co., made some payment to the total sum of N15,000,00 (Fifteen Thousand Naira) leaving a balance of N30,000:00 (Thirty Thousand Naira) with a promise to offset the balance. The Defendant is hereby put on notice to produce originals of the letters written to him by the Claimant solicitors at the trial of this suit.

By the terms of Exhibit C4, the defendant’s late father was to have repaid the sum of N45,000:00 on or before the 15th March 1991. Having paid N15,000 out of N45,000, it can be said that he has paid part of the loan. He paid part of the loan and did not pay again. The fact that the suit b/316/91 was struck out is no reason for the defendant’s late father or the defendant himself not to have paid back the entire loan. Repayment of the loan fell due in March 15th 1991; the extension to June of the same year was to give the defendant’s late father more time to pay, but he failed. A mortgagee at all times has an obligation to ensure that the money borrowed or debt owed is paid. There is no uncertainty about the money owed. The fact that the defendant’s late father paid N15,000:00 out of the N45,000:00 and has not up till this suit was filed in 2001 after 1991 when the repayment of the loan fell due, amounts to a default in the repayment of the loan. For a period of 10 years the defendant’s late father did not pay the balance

of N30,000. I agree with the contention of learned counsel for the Claimant that a mortgagor's right of redemption is not in perpetuity.

In Exhibit C4, the right of foreclosure in the event of nonpayment is inserted thereon and goes thus:-

"And Whereas the Mortgagor has approached the Mortgagee for a loan of N45,000:00 (Forty-five thousand naira) payable on or before the 15th day of March 1991 and in consideration of the Mortgagee granting the said loan of N45,000:00 (Forty-five thousand naira) the Mortgagor has deposited his title deeds in respect of the said house and property situate at No. 5A Ire Street, Off Wire Road, Benin City with the promise that if the Mortgagor fails to pay the said loan the mortgagee can foreclose and sell the said property and realize his said N45,000.00 (Forty-five thousand naira), from the sale of the said house and property situate at No. 5A Ire Street, Off Wire Road, Benin City otherwise known as the Mortgaged property.

So by the terms of Exhibit C4 referred to above the Claimant can foreclose the defendant and sell the property since the defendant's late father has defaulted in repayment of the loan.

I must not lose sight of Exhibit C5. Exhibit C5 is an affidavit deposed to by defendant's late father. It is dated 4th April, 1991. In Exhibit C5 the defendant's late father deposed to the fact that he borrowed N45,000 from the Claimant which fact confirms the amount stated as borrowed in Exhibit C4. Defendant's late father also deposed that he mortgaged his house at No. 5, 2nd Ire Street, Off Wire

Road, Benin City to the Claimant for the sum of N45,000 he borrowed from her and that he had deposited the title documents of the said house with the Claimant.

Exhibit C5 confirms that Defendant's late father was to repay the loan on 15th March 1991 but because he was unable to pay, time was extended for him to June 1991 for the last time after which he shall forfeit the said house to the Claimant and the Claimant could do anything she liked with the house including sale of it.

Exhibit C5 corroborates Exhibit C4 to a very large extent and in the absence of any contradiction of Exhibit C5, I have no option than to believe same and accordingly I do.

The Supreme Court in the case of Anambra State Housing Corporation v J. C. O. Emakwe (1996) 1 SCNJ 98.

Stated the circumstances under which the mortgagor's right of redemption can cease as follows:-

“What found its way into our statutes is no more than the historical Common Law practice of protecting the weak borrowing from the overbearing lender. Once the lender (Mortgagee) was adequately protected to

recover his money in full plus interest at reasonable time even if somewhat outside the contracted period the Mortgagor's equity of redemption should not be vitiated. What is essentially a mortgage in this case is dressed up as a conveyance with right to withhold possession from the Mortgagor until he liquidated the debt; but should he fail to liquidate by unreasonably defaulting in payment and was in arrears for long the Mortgagee's right of foreclosure should also not be vitiated."

I have read the book Equity and Trusts in Nigeria Second Edition by the learned author J. O. Fabunimi Cap Viii page 127 at 128 referred to by learned counsel for the claimant and using the book as a guide the circumstances listed therein under which an equitable mortgagor's right of redemption can be extinguished they are that:-

"The power of sale becomes exercisable when (i) notice requiring payment of the mortgage money has been served on the Mortgagor and default in payment of part or all of it has been made for three months afterwards; (ii) some interest is in arrears and unpaid for two months after becoming due; or (iii) the Mortgagor has broken some contractual or statutory provision other than the covenant for payment of the mortgage money or interest. A Mortgagee may also foreclose the mortgage. Foreclosure is a judicial procedure by which the Court Orders the termination of the Mortgagor's equity of redemption. By this order, the Mortgagee's interest ceases to be a security and becomes absolute. The Court issues a foreclosure order, which may be made absolute after six months."

A mortgagor's right of redemption continues until the mortgagor's title is extinguished or his interest is destroyed by sale either under the process of court or of the power in the mortgage incident.

See **Ejikeme vs. Okonkwo & Anor (1995 – 1994) All NWLR vol. 2 pg. 313 at**

322. Where the Supreme Court held thus:-

“The right continues unless and until the Mortgagor's title is extinguished or his interest is destroyed by sale either under the process of the Court or of a power in the mortgage incident to the security. This is a very important provision of a legal mortgage.”

I believe that the claimant filed this suit to begin the process of court towards extinguishing the interest of the defendant's late father in the property used as security for the loan after Exhibits D and D3 which I believe were Notices of Demand served on the defendant's late father for the repayment of the loan.

Learned counsel for the Defendant contends that the Claimant has been inconsistent in her claims from the defendant. He said in an earlier suit B/316/91 the relief claimed by the claimant against the defendant's late father was for the money loaned to the defendant's father and that she did not exercise any right if any to either sell or forfeit the property. That following the payment of the sum of ₦15,000, she did not show interest in the suit again which led to same being

struck out. He said the set of facts pleaded in this instant case are different from the one that has been struck out. He called in aid the Supreme Court case of **Okonkwo v. Okpain 2 NWLR (Pt 226) 633 at 647**, and **Chief of Air Staff v Iyen (2006) 6 NWLR (Pt 922) pg 496**. I have read the Claimants claim in Suit B/316/91 (Exhibit) and I do not see the difference in the set of facts in Suit B/316/91, the reliefs claimed against the defendant's late father as follows:-

- a) "An order directing the Defendant to pay to the plaintiff the said sum of N45,000:00 (Forty-five thousand naira) which the Defendant borrowed from the plaintiff as friendly loan free of interest.
- b) Interest on the said sum of N45,000:00 (Forty-five thousand naira) at the rate of 20% or at the current Bank rate from the 1st day of July 1991 to the date of Judgment in this case or until the whole debt is fully liquidated.

In the alternative

- c) An order that the Defendant should specifically perform his part of the bargain by transferring to the Plaintiff the Defendants said house and property situate at No 5A, 2nd Ire Street off Wire Road, Benin City in settlement of the debt of N45,000:00 (Forty-five thousand naira) owing by the Defendant to the plaintiff.
- d) Any other reliefs."

In the instant case, the reliefs claimed are as follows:-

- a) A Declaration that the Plaintiff is entitled to possession of the Mortgaged property lying and situate at No. 5A, 2nd Ire Street, Off Wire Road, Benin City, the Defendant's late father Mr. Williams Enogieru Aghahowa having Mortgaged same to the Plaintiff and the Plaintiff having foreclosed the mortgaged property and so the property in the

said house lying and situate at No. 5A, 2nd Ire Street, Off Wire Road, Benin City is now vested in the plaintiff absolutely under the terms of the said Deed of Mortgage.

- b) A Declaration that the property in the house and premises lying, situate and known as No. 5A, 2nd Ire Street, Off Wire Road, Benin City did not form part of the Real Estate of the defendant's late father on the date of his death, the said Defendant's late father having divested himself of the property in the said house under and by virtue of the aforesaid Deed of Mortgage and other documents and as such cannot devolve on any of his children.
- c) An order directing the Defendant to vacate plaintiff's said house lying and situate at No.5A, 2nd Ire Street, Off Wire Road, Benin City and give possession to the Plaintiff."

The reliefs sought in both suits are for recovery of money loaned or forfeiture of the property used as security for the loan. The fact that in 1991 it was the N45,000 with interest at 20% that was claimed and then in the instant suit the value of the money claimed is N25,000,000:00 is immaterial. Both are still within monetary claims.

Let it be known that a party has every right to amend his reliefs either by adding to it or subtracting from it. And if the claimant by order of court amended his reliefs in the present Further Amended Statement of Claim, I do not see anything wrong with it as long as the nature of the claim is the same. So the

contention of the learned counsel that the claimant has not been consistent in his claim is not tenable.

Let it be known also that an order striking out a suit does not prevent the Claimant from relitigating. A striking out order keeps the claim alive. See **H. B. (Nig.) PLC v Lodigiani (Nig.) Ltd (2010) 14 NWLR Pt 1213 Pg 330 at 348.**

The defendant in his pleadings and evidence raised two issues namely:

1. That his father was forced at the pain of death by claimant through her solicitor and fierce looking armed thugs to sign all sundry documents including Exhibit C4 and surrender his title documents and at a point was forced to seek police protection from the Claimant meaning that his father did not voluntarily sign Exhibit C4.
2. Fraud in that his father did not depose to or sign Exhibit C5, the affidavit further confirming Exhibit C4. That his father was again forced to sign Exhibit C5.

These two allegations border on criminality. Section 135(1) of the Evidence

Act states:

“If the commission of a crime by a party to any proceeding is directly in issue in any proceeding civil or criminal, it must be proved beyond reasonable doubt.”

In the case of **Niger guards Ltd v Usoroh (20101) 12 NWLR (Pt 1208) at**

Page 207 @ 221, the Court of Appeal per **Yahaya, J.C. A** held thus:-

“It is the law, that if the commission of a crime by a party to a proceeding is directly in issue, in any proceedings, civil or criminal, it must be proved beyond reasonable doubt. In this case, the allegation of fraud by the appellant against the respondent amounted to crime, but same was not proved beyond reasonable doubt. See Section 138(1) of the Evidence Act and **Agbi v Ogbelu (2006) 11 NWLR (Pt 990) 65 at 133.**”

As to whether the allegations raised by the Defendant in the instant were reported to the police, the Defendant under cross examination said yes and that the case was incidented but he had nothing to show for it.

No police extract was produced by the defendant and no evidence was adduced to that the case was pursued against the claimant, her solicitor and their thugs if any to a logical conclusion.

I find and hold that the claimant has not been inconsistent in her claim, neither has the defendant proved that Exhibit C4 and C5 were involuntary made by his father or fraudulently extracted from him.

From the circumstances of this case there is no doubt that the defendant’s late father had failed to pay the entire loan of N45,000:00 though he paid

N15,000:00 leaving a balance of N30,000 which has long fallen due in fact for about 10years before this suit was instituted and since institution now, for about 15 years making a total of 25 years. The equity of redemption by the defendant's late father and the defendant himself have long been over due This is unfair. However, there is also evidence that the Claimant has received part payment of N15,000.

The question that arises in my mind now is, will it be just to make an order for the sale of a whole house in an urban area in Wire Road, Benin City for a debt of N30,000 , this to me will be unjust and unconscionable and will it also be just to say that what the Claimant is entitled to after 25 years of the defendant withholding her N30,000 taking into consideration the state of the Naira currency up to now is just the same N30,000:00? This will also be unfair and unreasonable.

No doubt the loan has fallen due and the Defendant is obliged to pay it. The Claimant on the other hand is entitled to her money. The alternative claim of the Claimant in her further amended statement of claim is monetary sum of N25,000,000 being the estimated value of the mortgage property according to her which means that the claimant is willing to be compensated in damages.

What then is the quantum of reparation the Claimant will be entitled to consequent upon the breach of the equitable mortgage between the Defendant and Claimant.

In consideration of this issue I agree with the contention of learned counsel for the Claimants that the depreciating value of the naira must be taken into consideration, for the N30,000 and not N45,000 as Claimants has received N15,000 as part payment of the N45,000 loaned to the Defendant's late father.

In law, I am entitled to take judicial notice of the depreciating trend over the years of the value of naira currency since 1991. I am fortified in this decision by the cases of

1. **Joseph O. Mayange V Punch Nig . Ltd (1994) 7 NWLR (Pat 358) Pg 570 at 582 – 583** where it was held thus:-

“The learned triad judge in his judgment of 26/7/89 awarding N20,000:00 general damages for libel to the Appellant, did not take into consideration the trend of inflation and the depreciation in the value of the naira. The Court of Appeal has at least in two decided cases, taken into consideration, the factor of the trend of inflation and depreciation of the value of then naira in assessing general damages for libel. See (i) **Daily Times v. Williams (1986) 4 NWLR (Pt 526, Where Ademola J. C. A** said:

2. **Dr Ohuru Orji Kalu & Anor vs. Dr S. Mbuko (1988) 3 NWLR (Pt 80) pg 86 at 105**

was relied upon by learned counsel for the claimant and in the Supreme Court case, of **Eesigbe v Aghohor (1993) 9 NWLR (pt 316) pg 128 at 158 paras B-**

D the case of **Dr O. O. Kalu & Anor v Dr Mbuko (Supra)** was referred to Per **Iguh J.**

S. C.

“... In arriving at the above conclusion I have taken into consideration the steady decline in the purchasing power of the naira at all material times. See **Amos Adenaike V Osobu & Another (1980).Ogun SLR at 25; Dr. O. O. Kalu v Dr S. Mbuko (1988) 3 NWLR (Pt 80) 86 at 105.** I have given a most anxious consideration to what may be regarded as fair and reasonable general damages that the appellant is entitled to having regard to the massive injuries she sustained from the accident and find N50,000:00 conservatively appropriate.”

Before I conclude, I want to state that the Claimant in this case is not entirely without blame. When suit B/316/91 which she initially instituted in 1991 was struck out, she rested on her own for 10 years. She was indolent after collecting part of the loan N15,000. After 10 years she now filed this suit for the balance. Though the money paid by to the Defendant’s late father was due in 1991, had suit B316/991 not been struck out, maybe the defendant’s late father or even the defendant would not have gone to sleep over the issue too. So I cannot overlook the fact the Claimant by her conduct contributes to the delay by the defendant in redeeming the mortgage after collecting part payment of the loan and allowing her suit to be struck out in 1991.

In the final analysis I find and hold that:

1. The Defendants late father having paid N15,000 towards the redemption of the equitable mortgage he entered into with the Claimant on the 14th day of February 1991 for the sum of N45,000, the balance due payment is N30,000.
2. That because of the depreciation in the value of the naira currency since 1991 when payment was due, the sum of N30,00 today is inadequate, and worthless as balance money to refunded to the Claimant. Instead I enter judgment for the Claimant and against the Defendant for the sum of N1.5 million as damages.

I cannot order interest to be paid before the date of this judgment because the loan was interest free.

Order 33 Rule 4 of the High Court Civil Procedure Rules 2012 states:-

“The Judge at the time of making any judgment or order or at any time afterwards, may direct the time within which the payment is to be made or other act is to be one, reckoned from the date of the judgment or order, or from some other point of time, as the Judge deems fit and may order interest at a rate not more than 20% per annum to be paid upon any judgment.”

I therefore order interest to be paid on the judgment sum at 20% per Annum from the date of this judgment till judgment is paid.

EDIGIN E. A.
JUDGE
2/08/2016

A.I. Ekama (Mrs.) appears for the Claimant

O.B. Oboh (Miss) appears with G. Ugbodagah (Miss) for the Defendant.